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In The

Supreme Court of the United States

October Term, 1968

No. 1142

JAMES HENRY SMITH,

Petitioner

vs.

STATE OF NORTH CAROLINA,

Respondent.

Brief of Respondent State of North Carolina in Opposition to Petition For Writ of Certiorari

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported in 268 N. C. 659, 151 S.E. 2d 596,

JURISDICTION

The Judgment of the Supreme Court of North Carolina was entered on December 14, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1257 (3).

QUESTION PRESENTED

WAS THE PETITIONER DEPRIVED OF ANY CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT UNDER THE CIRCUMSTANCES OF THIS CASE?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is:

Fourteenth Amendment to the United States Constitution "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On Monday, April 25, 1966, at 10:00 A. M. in the Courthouse in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding. All persons summoned to attend this term as jurors were asked to stand, Bibles were distributed to them, and each juror summoned for the trial placed his or her left hand on the Holy Bible, and raised his or her hand upward, whereupon the Clerk of the Hoke County Superior Court then administered the following oath: "You and each of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God" R. p. 5.

The Petitioner was charged with first degree murder. R. p. 4. On the call of the case, the Solicitor announced that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. R. p. 4.

Counsel for the Petitioner and the Petitioner thereupon examined each of the respective jurors that had been summoned for the term and had been sworn in as a body and selected the jury that heard the Petitioner's case. R. p. 6. No question was raised at this time, or at any time through-

at the trial, concerning the selection or swearing of the jury.

After the Petitioner and State had passed upon a satisfactory jury, and one alternate, the Clerk of the Superior Court made the following statement:

> "Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly."

The Petitioner was tried and the jury subsequently returned a verdict of "guilty of murder in the second degree." R. pp. 125-129. Thereupon, the Petitioner took exception to the Judgment of the trial court and gave Notice of Appeal to the Supreme Court of North Carolina.

ARGUMENT

THE PETITIONER WAS FOUND GUILTY BY A JURY DULY IMPANELED AND SWORN AS PROVIDED FOR BY LAW IN THE STATE OF NORTH CAROLINA AND IN SUCH A MANNER THAT NONE OF HIS CONSTITUTIONAL RIGHTS WERE DENIED.

The following appears at pages 5 and 6 of the Record:

> "On Monday, April 25, 1966, at 10:00 A. M. in the Courthouse in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding and holding said Court according to law. All persons summoned to attend said term as jurors were asked to stand, and Bibles were distributed to them, and each juror summoned for the term placed his or her left hand on the Holy Bible, and raised his or her hand upward; whereupon the Clerk of Hoke County Superior Court then administered the following oath: 'You and each

of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God.' It is not known whether the defendant was physically present in the courtroom at the time the aforementioned oath was administered. The attorneys for the defendant were not present. Thereupon the Solicitor duly began to call the docket of cases set for trial at the April 25, 1966, Criminal Term of Hoke County Superior Court.

"On Tuesday, April 26, at approximately 10:00 A. M., the Solicitor for the Ninth Solicitorial District, the Honorable Lester G. Carter, Jr., called the defendant's case for trial upon a Bill of Indictment charging the defendant with murder in the first degree. Upon the call of the case for trial, the Solicitor announced in open court that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. The defendant, James Henry Smith, by and through his counsel, tendered a plea of not guilty to those charges embraced within the Bill of Indictment.

"The Court found that the trial of this case was likely to be protracted and directed that an alternate juror be selected and required to serve in the manner provided by law.

XXX

"A duly summoned jury was selected. After the State and Defendant had announced satisfaction with the jury panel, the Clerk of Hoke County Superior Court stood and made the following statement: 'Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly.' "

Neither the Record nor the Petitioner's Brief recites that

the Petitioner did not realize, as is the universal practice in North Carolina in non-capital criminal cases, that the jury had not been resworn after having been impaneled. Obviously, Petitioner, his counsel, or both, realized this fact since their memory as to what actually happened is so vivid. The Petitioner did not raise this question in the trial below, but did so for the first time on appeal to the Supreme Court of North Carolina.

Many other jurisdictions are quoted from as disapproving the "single swearing" of the jury. However, we must remember that involved here is a North Carolina practice of long standing which, if overturned, would cause a flooding of petitions in the courts of this State from individuals convicted of non-capital criminal offenses by jurors which were sworn initially at the beginning of the term and not again resworn after impaneling. In all non-capital criminal actions, the jurors in North Carolina are sworn only once, at the beginning of the term, unless, of course, additional jurors are required in the event the initial panel is exhausted. However, this is not the case here since the jury that tried the Petitioner's cause was selected from the original panel sworn as a body on Monday, April 25, 1966. Moreover, it should be re-emphasized that, though the defendant was indicted for a capital crime, the Solicitor announced to the trial court that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. Both murder in the second degree and manslaughter are non-capital felonies. N. C. G. S. 14-17; 14-18. Then, and only then, by and through his counsel, did the Petitioner enter his plea.

N. C. G. S. 11-11 prescribes among other oaths, the oath necessary for jurors in all non-capital criminal actions.

> "Jury, in Criminal Actions Not Capital.—You and each of you swear (or (affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God."

The Petitioner has correctly asserted that under the common law it was essential "that the jury be duly sworn to try *the cause*". 31 Am. Jur. Jury, Sec. 242 (1958). (*Emphasis added*) See also, 50 C.J.S., Juries, Sec. 294 (1947). However, where the statute so provides, as is the procedure in North Carolina, G. S. 11-11, *supra,* a general oath may be administered to jurors at the opening of a court for the trial of issues and it is not mandatory that the jurors again be sworn in each cause in which they are called. THE PEOPLE, ON THE RELATION OF WANDS, v. ALBANY, C. P., 6 Wend. (N.Y.) 548; 31 Am. Jur., Jury, Sec. 242, *supra.*

The history of North Carolina G. S. 11-11 is discussed in detail by the Court, through Sharp, J., in STATE v. SMITH, 268 N. C. 659, 151 S.E. 2d 596 (1966), 268 N.C. 663,664, and we quote:

> "In North Carolina, the common-law requirement that jurors be sworn to try the cause was changed with reference to civil cases 'At a General Assembly, begun and held at Fayetteville on the First Day of November, in the Year of our Lord, One Thousand Seven Hundred and Ninety, and in the Fifteenth Year of the Independence of the said State: Being the First Session of the said Assembly.' Preamble to the Laws of North Carolina (1790). Chapter IX of these Laws provided:
>
> "WHEREAS the present method practised in the courts of law in this state of swearing the petit jury in every cause, in some measure regards the business in said Courts, and such frequent use of oaths in a great measure destroys their solemnity:
>
> "I. *Be it therefore enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* that from and after the first day of June next, the clerks of the respective courts of law, shall at the beginning of their courts, swear or cause to affirm such of the petit jury as are of the

original pannel, well and truly to try all civil causes that shall come before them according to the evidence given thereon, and if there should not be enough of the original pannel, talismen shall take a similar oath or affirmation to try such causes as shall come before them during the day. Provided always . . . that nothing herein contained shall be construed to alter the present method of swearing petit jurors on state trials, but the same shall continue in the usual form as heretofore practised.'

"In Taylor's Revisal of 1827, Chapter 1133, it was enacted,

'That in the trial of all pleas and prosecutions for offences not capital, unless in cases where the courts may otherwise direct, petit jurors, as well (as) talismen, as those of the original pannel, shall be sworn or affirmed, (as the case may be,) well and truly to try all issues of traverse, that shall come before them *during the day*.' (Italics ours.)

"Thus, instead of swearing jurors in every criminal case, in 1827 they were sworn only once a day. In the Revised Code of North Carolina, enacted by the General Assembly of 1854, Chapter 76 (30), we find the same oath provided for 'criminal cases not capital' which is now incorporated in G. S. 11-11. Thus, in 1854, the 'method of swearing petit jurors on State trials' other than capital (which the General Assembly of 1790 had refused to alter when it changed the method of swearing jurors in civil actions) became the same as that prescribed in civil trials. Since 1827 the statue—not the common law—has governed the procedure in cases such as this."

The State recognizes the fact that a conviction by an unsworn jury is a nullity and may be raised at any point during the proceedings of the case. However, this case is distinguishable in that all persons summoned at the April 25,

1966 Criminal Term of the Hoke County Superior Court to serve as jurors were in fact sworn. After the State and the Petitioner had announced their satisfaction with the jury panel, the Clerk stood and made the following statement: "Members of the jury, you have been sworn and are now impaneled to try this action within the State of North Carolina as the plaintiff and James Henry Smith as the defendant; sit together, hear the evidence, and render your verdict accordingly."

There can be no doubt that the solumn duty that the jury was to perform in this particular case was re-emphasized.

Petitioner further contends that his attorneys were not present in the courtroom, and the record does not disclose whether the Petitioner was present or not, at the time the general oath was administred to the prospective jurors at the beginning of the term of court. Petitioner concludes that his absence, if he were absent, deprived him of due process of law.

Regardless of Petitioner's presence at the time the general oath was administered, it was from this sworn panel that the Petitioner selected the twelve jurors, and one alternate, that tried his case. The Petitioner does not here contend that he, or his counsel, were denied an opportunity of selecting from the original sworn panel of jurors the twelve that heard and decided his case. He was obviously satisfied with the jury selected at the time of trial because no question was raised at any time during the procedings at the trial level.

Therefore, if the Petitioner were absent at the time the general oath was administered to the prospective jurors, we do not believe that any of his substantial rights were affected. Petitioner has not shown he was prejudiced in any way. STATE v. ARNOLD, 258 N. C. 563, 129 S.E. 2d 229 (1962), reversed on other grounds, 276 U.S. 773 (1964); 23 C.J.S. Criminal Law, Sec. 974, p. 890 and note 70 (1961).

As Petitioner has pointed out in his Brief, the Supreme

Court of North Carolina has said that in every criminal prosecution it is the right of the accused to be present throughout the trial. STATE v. MATTHEWS, 191 N. C. 278, 131 S.E. 743 (1926); STATE v. DRY, 152 N.C. 813, 67 S.E. 1000 (1900). However, the Supreme Court of North Carolina has interpreted this to mean that the accused has a right to be present at every stage of the trial when his substantial rights may be affected by the proceeding against him. STATE v. ARNOLD, *supra*. Here, Petitioner's absence, and the absence of his counsel, at the time the general oath was administered could not have "affected any of his susbtantial rights". He was not on trial at the time. The Petitioner's case was called for trial the day after the general oath was administered to the prospective jurors. When his case was called for trial, and Petitioner does not contend otherwise, he and his counsel were present throughout the entire proceeding.

CONCLUSION

The Petitioner was tried by a sworn jury. None of his constitutional rights were denied because the jury which tried his cause was sworn at the beginning of the April 26, 1966 term of the Superior Court of Hoke County and not again immediately preceding the trial of Petitioner's case.

Respectfully submitted,

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